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Petitioner,

v.

[redacted]

Respondent.

[redacted]

RESPONDENT'S BRIEF ON THE MERITS

ROBERT L. BARRASSO
(Appointed by this Court)
[redacted]

[redacted]

QUESTIONS PRESENTED FOR REVIEW

Did the trial court and the Court of Appeals properly hold that since the Respondent had invoked his Fifth Amendment right to counsel during his initial interrogation and counsel was never provided, that statements made by Respondent, pursuant to subsequent interrogation, must be suppressed?

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TABLE OF CASES AND AUTHORITIES

Respondent does not take issue with Petitioner's statement of the trial court and Court of Appeals holdings, its jurisdictional statement and its citation of the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

For the purpose of simplification, Respondent will refer to the April 16, 1986 burglary as Crime One and the April 15, 1986 burglary as Crime Two.

On April 16, 1986, Respondent was arrested near the scene of a burglary which had occurred only moments earlier. At that time, he was advised of his *Miranda* rights by the arresting officer, Officer Perez, and "subject replied that he understood his rights and that he wanted a lawyer before answering any questions." (R.T. of April 3, 1986 at 26). After he invoked his right to counsel, another officer, Officer Garrison, questioned Mr. Roberson at the scene of the arrest regarding Crime One. (*Id.* at 23). Shortly thereafter, another officer, Detective Quinn, questioned Mr. Roberson at the scene of the arrest, again, regarding Crime One. (R.T. of October 17, 1985).

The officers transported Mr. Roberson to an eastside police substation, and there, Detective Quinn and another officer, Detective Wright, engaged in further interrogation of Mr. Roberson regarding Crime One. (*Id.* at 9-11).

Next, the officers booked Mr. Roberson and put him in jail. At this point, Mr. Roberson still had not been allowed to consult with counsel. The next day, still two more officers approached Mr. Roberson while he was in jail and further interrogated Mr. Roberson regarding Crime One.

On April 19, still in jail and having been in continuous custody, another group of officers, Detectives Cota-Robles, Quinn and Thorson, went out to the jail and interrogated Mr. Roberson about Crime Two. The detectives read to him his *Miranda* rights. Mr. Roberson stated

that he understood them and wanted to talk. Mr. Roberson had not spoken to a lawyer since his arrest on April 16, 1986. (R.T. of April 3, 1986 at pp. 3-7, 15-16).

The trial court and the Court of Appeals suppressed the statements made by Mr. Roberson during the April 19 questioning in the state's case-in-chief regarding Crime Two, finding the statements were obtained in violation of Mr. Roberson's Fifth Amendment rights. It is those statements made on April 19, regarding Crime Two, which are the subject of this appeal.

SUMMARY OF ARGUMENT

Miranda and *Edwards* clearly hold that a defendant's right to silence under the Fifth Amendment also entails the right to have an attorney present before speaking during custodial interrogation. The bright line rules of *Miranda* and *Edwards* require a finding that where a defendant remains in custody after requesting counsel, any subsequent interrogation would be unduly coercive and, therefore, statements made in subsequent interrogations must be suppressed. The subject matter of those interrogations is irrelevant under Fifth Amendment analysis since it is the voluntariness of the statements that is the issue. In the present case, Mr. Roberson clearly decided to speak to counsel before making statements to the officers and indicated as much to the police. He was then confined for several days and reinterrogated without speaking to a lawyer. The statements made during the subsequent interrogation were properly suppressed. The trial court and the Court of Appeals correctly held that the statements should be excluded from the State's case-in-chief. This Court should affirm the lower courts' decisions.

INTRODUCTION

Prior to engaging in an analysis of the Petitioner's specific arguments, it is important to recall some basic principles of American jurisprudence regarding criminal procedure laws grounded in the United States Constitution.

The Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination applies to the states pursuant to the Due Process Clause of the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964). Evidence obtained in violation of this privilege must be excluded from trial. *Edwards* v. *Arizona*, 415 U.S. 477, 485, 101 S.Ct. 1880 (1981).

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the Court quoted extensively from an early Fifth Amendment case, *Brown* v. *Walker*, 161 U.S. 591 (1896), to point out the reasons why the framers of the United States Constitution found it so imperative to provide each person the privilege against self-incrimination:

> Over 70 years ago our predecessors on this Court eloquently stated:
>
> > The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admission or confessions of the prisoner, when voluntarily and freely made, have always ranked high

in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment. *Brown* v. *Walker*, 161 U.S. 591, 596-597 (1896).

384 U.S. at 442-43. In the words of Chief Justice Marshall, by fixing the privilege against self-incrimination in the Constitution, the precious right was secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it." *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Furthermore, the Court in *Escobedo* v. *Illinois*, 378 U.S. 485 (1963), recognized that American jurisprudence has traditionally taken a dim view of the State relying too

heavily on a suspect's confession to a crime. The Court stated:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:
>
> > *"[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)
>
> This Court also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . ." *Haynes* v. *Washington*, 373 U.S. 503, 519. (Footnotes omitted.)

378 U.S. at 488-90.

In *Miranda* v. *Arizona*, *supra*, the Supreme Court recognized that custodial interrogations generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467, 86 S.Ct. at 1624. To combat the compelling pressures which are involved in the very nature of custodial interrogations, and to provide an in-custody suspect a full opportunity to exercise his Fifth Amendment right against self-incrimination, the Court formulated a set of procedural safeguards in order to secure the privilege against self-incrimination. The Court in *Miranda* held that prior to initiating any questioning, the State must adequately and effectively apprise the suspect of his rights, "and the exercise of those rights must be fully honored." *Id.* *Miranda* goes on to say that when an accused requests to remain silent, "the interrogation must cease." If he states that he wants an attorney, "the interrogation must cease until an attorney is present." *Id.* at 473-74, 86 S.Ct. at 1627.

In *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), the Court formulated another procedural safeguard designed to secure the privilege against self-incrimination. The Court in *Edwards* adopted the rule that when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85, 101 S.Ct. at 1885.

In a later case, *Solem* v. *Stumes*, 465 U.S. 638, 104 S.Ct. 1338 (1984), the Court explained the effect of *Edwards:*

> *Edwards* established a bright line rule to safeguard pre-existing rights, not a new substantive requirement. Before and after *Edwards* a suspect had a right to the presence of a lawyer, and could waive that right. *Edwards* established a new test for when that waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication.

465 U.S. at 646.

ARGUMENTS

I. THE TRIAL COURT AND THE COURT OF APPEALS PROPERLY HELD THAT MR. ROBERSON'S STATEMENTS COULD NOT BE USED IN THE PROSECUTION'S CASE-IN-CHIEF BY A CORRECT APPLICATION OF *MIRANDA* V. *ARIZONA* AND *EDWARDS* V. *ARIZONA*.

In *Miranda* and in the cases following *Miranda*, the Supreme Court has made a clear distinction among the cases in which an accused has merely invoked his right to remain silent and those cases in which he has invoked the right to counsel before answering questions. Where the accused simply asserts his right to remain silent, the police may resume custodial interrogation if the right of the accused to cut off questioning is scrupulously honored. *Michigan* v. *Mosley*, 423 U.S. 96, 96 S.Ct. 321 (1975); *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). On the other hand, where the accused requests counsel, the interrogation must immediately cease and it may not resume until the accused is provided with counsel. *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981). Discussing the difference between requesting counsel and merely remaining silent, the Court in *Edwards* stated:

> *Miranda*, itself indicated that the assertion of the right to counsel was a significant event and that once

exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474. Our later cases have not abandoned that view. In *Michigan* v. *Mosley*, the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated he wanted counsel. In *Fare* v. *Michael C.*, the Court referred to *Miranda's* "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." *Rhode Island* v. *Innis*. *We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for authorities at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.* (Citations omitted). (Emphasis added).

451 U.S. at 485.

In a more recent case, *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986), the Court again noted the distinction between a suspect's request for counsel and a request to remain silent:

> When a suspect *has* requested counsel, the interrogation must cease, regardless of any question of waiver, unless the suspect himself initiates the conversation. (Emphasis added).

475 U.S. 414, n.1. Because the suspect in *Moran* simply requested to remain silent rather than requesting counsel, the Court held that a reinterrogation of the suspect was proper.

In *Michigan* v. *Mosley, supra*, Justice White stated succinctly in his concurring opinion the reason why the Court distinguishes between a simple request to remain silent and a request to remain silent until one can speak with an attorney:

> [T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. *More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.* (Emphasis added).

423 U.S. at 110, n.2.

The Arizona court recognized the distinction between a suspect's request for counsel and a mere request to remain silent. The Arizona Supreme Court, in *State* v. *Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), held that once an in-custody suspect had invoked his Fifth Amendment right to counsel, the police could not properly reinterrogate the suspect until he was provided with counsel. It did not expand *Edwards*. The fact that the renewed questioning pertained to a separate crime than the one for which he was initially arrested was found to be irrelevant. That fact lacked "any legal significance for Fifth Amendment purposes," the court held. *Id.* at 96-97, 669 P.2d at 76. The court in *Routhier* reached its decision by correctly and consistently applying well-settled principles of Fifth Amendment Constitutional Law, as explained in *Miranda* and *Edwards*.

In the present case, Mr. Roberson requested a lawyer immediately after being taken into custody. Instead of being allowed to speak with a lawyer, he was questioned four different times regarding Crime One (all in clear violation of *Edwards)*, spent *three days* in jail, still without having an opportunity to consult with a lawyer, and on the third day of his incarceration, a detective approached Mr. Roberson, not at Mr. Roberson's request, and questioned him a fifth time since the invocation of his right to counsel. The only distinction was that he questioned him regarding a separate crime. As in *Routhier, supra,* the fact that the renewed questioning pertained to Crime Two is irrelevant and lacks any legal significance for Fifth Amendment purposes.

A quote from the Arizona Supreme Court in *State* v. *Routhier, supra,* is particularly appropriate here to explain why the statements made by Mr. Roberson should be excluded from the State's case-in-chief:

> The assertion of the right to counsel is an expression by the accused that he is not competent to deal with the authorities without legal advice. See *Edwards* v. *Arizona, supra.* The resumption of questioning in the absence of an attorney after an accused has invoked his right to have counsel present during police interrogation strongly suggests to an accused that he has no choice but to answer. Thus, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (Quoting *Michigan* v. *Mosley,* 423 U.S. 96 (1975), White, J., concurring).

Id. at 97-98, 669 P.2d at 76-77.

There is compelling evidence that Mr. Roberson's statements where involuntary. The type of police misconduct which occurred in this case was exactly the type which this Court attempted to prevent in *Edwards* v. *Arizona.*

Mr. Roberson's perception of whether he should talk or not was not affected by whether he was talking about "Crime One" or "Crime Two." Rather, his sense of compulsion came from the oppressive custodial setting, the fact that he had requested a lawyer and was not provided with one, and the fact that he was questioned again and again by police officers after he had requested a lawyer. All of these factors combined strongly suggested to Mr. Roberson that he had no choice but to answer. Under these circumstances, there can be no finding that Mr. Roberson made the statements voluntarily and there can be no finding that Mr. Roberson made any valid waiver of his right to counsel. For, "[t]o permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Michigan* v. *Mosley,* 423 U.S. 96, 102 (1975).

The purposes of the Fifth Amendment, *Miranda,* and *Edwards* were clearly offended by the present case: A request for counsel was ignored, four rounds of custodial questioning took place, the Respondent was held in jail for three days without any contact with counsel and then questioned a fifth time. The trial court and the Court of Appeals properly held that Mr. Roberson's statements made during this fifth interrogation could not be used in the prosecution's case-in-chief. Likewise, this Court should so hold.

II. SINCE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION HAS AS ITS FOCUS THE STATE OF MIND OF THE SUSPECT, WHETHER THE POLICE OFFICERS WHO INITIATED THE REINTERROGATION OF THE SUSPECT KNEW OR DID NOT KNOW OF THE SUSPECT'S PRIOR INVOCATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL, AND WHETHER THE REINTERROGATION FOCUSED ON "CRIME ONE" OR "CRIME TWO" ARE IRRELEVANT IN DETERMINING WHETHER THE SUSPECT'S FIFTH AMENDMENT RIGHTS UNDER *MIRANDA* AND *EDWARDS* WERE VIOLATED.

With a proper understanding of the goals of the Fifth Amendment privilege against self-incrimination as set forth in *Miranda* v. *Arizona*, and *Edwards* v. *Arizona*, it becomes evident that in analyzing the privilege and the question of voluntariness of a waiver of the privilege, the courts should focus solely upon the mental state of the suspect and his sense of compulsion. This focus is to assure that any statements made by the suspect are voluntary. To that end, "the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights." *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986).

Similarly, once an in-custody suspect has invoked his right to counsel, the subject matter of a police-initiated reinterrogation is irrelevant in determining whether the suspect's rights were violated. When the suspect has requested counsel before answering any questions, the suspect becomes "off-limits" to the police and the police may not re-approach him for questioning on any subject until he has been provided counsel or until he himself initiates communication or conversation. This rule is clearly stated in *Edwards:*

> [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, . . . the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with police. (Citations and footnote omitted).

451 U.S. at 484-85.

Mr. Roberson was arrested in Crime One, requested counsel before answering *any* questions, was asked questions about Crime One four times, and then was questioned a fifth time about Crime Two. When he was asked about Crime Two, an officer who previously questioned him regarding Crime One was present and did part of the questioning. Nothing in these facts indicate Mr. Roberson acted voluntarily. The State confuses the simple issue presented in this case by wrongly relying on various prior cases which distinguish between investigations.

The Petitioner's reliance on the "separateness" of the investigation which lead to the subject confession is misplaced. The Petitioner uses a passage from *Westover* v. *U.S.*, a companion case of *Miranda*, in support of its case. It does so by ignoring the clear facts before this Court. *Westover* states:

> A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings and then adequately advised of his rights and given an opportunity to exercise them.

The Court goes on to say:

> But here the FBI interrogation was conducted immediately following the State interrogation in the same police station - in the same compelling surroundings. Thus, in obtaining a confession from Westover, the Federal authorities were *the beneficiaries of the pressure applied by the local in-custody interrogation*. In these circumstances, the giving of warnings alone was not sufficient to protect the privileged. (Emphasis added).

384 U.S. at 496-97.

The State actually argues that the fact that Mr. Roberson was removed in time and place from his original surroundings are facts in favor of the State's argument. This is ridiculous. He was removed from the scene of the arrest, taken and booked into custody in a jail and never given an attorney. As set forth in Petitioner's Statement of Facts, he was questioned five different times after originally asking to speak only through an attorney. He was clearly not given an opportunity to exercise his right to remain silent and to speak only through counsel.

The Petitioner argues that the facts in the present case are almost identical to those in the hypothetical set forth above in *Westover*. However, the facts of the Roberson case are much more like the actual facts of *Westover*. Roberson was in the "same compelling surroundings" at the time of his confession, namely, under arrest and in custody of the State. Also, the detectives in this case, in obtaining a confession from Roberson, "were the beneficiaries of the pressure applied by the in-custody interrogation" of others.

Next, the State argues that *Michigan* v. *Mosley*, 423 U.S. 96 (1975), should control the outcome of the present case. The State fails to recognize clear distinctions between this case and the facts of *Michigan* v. *Mosley*. The most obvious distinction is that the defendant in *Mosley* merely requested to remain silent, rather than requesting counsel. *Michigan* v. *Mosley* itself, as set forth in direct quotes above, distinguishes between the need to keep lines of communication open when an accused has chosen only to be silent, and the lack of such need when the accused has decided to deal with the authorities only with legal advice. Since Mr. Roberson decided to deal with the authorities only through an attorney, *Mosley* does not control this case and subsequent statements made without removal of the coercive atmosphere and without honoring his request for counsel must be considered involuntary.

Next, the State misapplies *Oregon* v. *Elstad* to the case at hand. *Oregon* v. *Elstad's* key holding is:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warning unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free-will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

The difference between *Elstad* and the present case is as follows: Elstad's first confession was without Miranda warnings, thus his subsequent waiver of his rights was not prefaced by a prior request for counsel. Roberson requested counsel first and thus, the reinterrogation indicated to him that he did not have the choice of consulting

an attorney, *since he had requested one and his request was ignored.*

The error of the State's argument is further documented by this statement found on page 28 of its brief:

> The circumstances here (passage of time, change of place, change of interrogators) include all the factors which would serve to dissipate the coercive effect of even an involuntary initial statement, as well as the proper administration of Miranda warnings by Det. Cota-Robles which by itself would cure an uncoerced and voluntary initial statement.

To the contrary, the passage of time and the repeated interrogations by various officers only aggravated the coercive effect. While Mr. Roberson was waiting for the lawyer he had requested in order to talk to the police, he continued in custody without counsel and the repeated questioning by police did not dissipate the coercive nature of the situation but clearly added to it. The actions of the police, and the fact Mr. Roberson was kept in custody without an attorney implied to him a clear message: Our statement about your right go an attorney is a lie. That being the message, the confession was involuntary.

Petitioner argues that *Connecticut* v. *Barrett*, ___ U.S. ___, 107 S.Ct. 828 (1987), mitigates in its favor. The defendant in *Barrett* clearly indicated the desire to talk voluntarily without counsel. The restriction he invoked was that he would not put anything in writing without counsel and the State complied with that restriction. The Supreme Court held that there was no reason to interpret his request for an attorney more broadly than the clear limiting language of the request indicated. The court stated:

> To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

107 S.Ct. at 832.

In the present case, Petitioner argues that Mr. Roberson invoked his Fifth Amendment rights for the limited purpose of discussing "Crime One" and not for "Crime Two." However, a reading of the record indicates quite the contrary. When the police arrested Mr. Roberson and advised him of his *Miranda* rights, "subject replied that he understood his rights, and that he wanted a lawyer before answering *any* questions." (R.T. of April 3, 1986 at p. 26). (Emphasis added). An interpretation of this request according to its ordinary meaning indicated that Mr. Roberson fully invoked his right to counsel for all purposes and all subjects of interrogation.

Indeed, this Court has required that "a broad, rather than a narrow, interpretation to a defendant's request for counsel" be given, *Michigan* v. *Jackson*, ___ U.S. ___, 106 S.Ct. 1404, 1409 (1986). The Seventh Circuit, in interpreting *Connecticut* v. *Barrett*, stated ". . . a court must presume that an individual has invoked the full extent of his or her constitutional right to counsel." *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 123 (7th Cir. 1987).

In addition to *Mosley, Elstad* and *Barrett*, Petitioner cites some Sixth Amendment cases: *Michigan* v. *Jackson*, 475 U.S. 625, 106 S.Ct. 1404 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 106 S.Ct. 477 (1985); and, *Moran* v. *Burbine*, 475 U.S. 412, 106 S.Ct. 1135 (1986). The Fifth Amendment and the Sixth Amendment encompasses two very distinct rights. It is true that Fifth Amendment analysis has been, and continues to be, applied to Sixth Amendment cases, but no case suggests that Fifth Amendment rights should be restricted because of Sixth Amendment analysis. This is a Fifth Amendment case

and it should not be restricted by a Sixth Amendment analysis.

Petitioner further confuses the issues by attempting to apply the independent source doctrine to this case. The Petitioner argues that the State is placed in a worse position that it would have been had it not violated Mr. Roberson's rights. This presumes Mr. Roberson would have acted differently if his first *Miranda* warning occurred after he was placed in jail. There is no evidence to support this. Mr. Roberson, we must presume, would have requested counsel then. It is only after his request went unheeded that he spoke, giving up a right that to Mr. Roberson seemed worthless by then. Had Mr. Roberson been supplied with an attorney before any further interrogation, he and his attorney would have decided to proceed with his defense and in all likelihood he would not have made subsequent admissions. The source of Mr. Roberson's statements was not independent but rather caused by continual police custodial interrogation after assuring Mr. Roberson he had the right to counsel.

III. THIS COURT SHOULD RETAIN *EDWARDS* V. *ARIZONA* AND ITS *PER SE* RULE AGAINST POLICE-INITIATED REINTERROGATION OF AN IN-CUSTODY SUSPECT AFTER HE HAS INVOKED HIS FIFTH AMENDMENT RIGHT TO COUNSEL.

As noted above, this Court adopted the *Edwards per se* rule against police-initiated interrogation as a means of providing an in-custody suspect a full opportunity to exercise his privilege against self-incrimination. The Court recently explained that the purpose behind *Miranda* v. *Arizona* and *Edwards* v. *Arizona* is "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona* v. *Mauro*, ___

U.S. ___, 107 S.Ct. 1931, 1936-37 (1987). There is a supreme interest in ensuring that the Constitution is upheld, that due process is given to all persons subject to the court system and to ensure an effective adversary process. *Miranda* and *Edwards* have done well in ensuring the promotion of these interests. Taking away *Edwards* would be taking a major step backward in the fair, efficient and consistent application of criminal procedure laws grounded in the constitution. Furthermore, to not apply *Edwards* to the present case would be to strip the suspect's request for counsel of any meaning and to give little accord to his Fifth Amendment privilege against self-incrimination.

There is a great interest in preventing a recurring pattern of the police behavior which occurred in the present case. A suspect's invocation of his right to speak with counsel before answering questions would have no meaning whatsoever if the police were allowed to repeatedly question the suspect before honoring his request for counsel. Repeated custodial interrogations after a request for counsel gives the suspect the impression that his request has no practical meaning and that he has no choice but to answer, regardless of the subject reinterrogation or the mental state of the interrogator.

The *Edwards per se* rule is easy to understand and likewise easy to apply. It is no imposition on the police to refrain from questioning the suspect until he has been provided with counsel, once he makes the request. It is totally unacceptable for the police to hold a suspect for three days and to engage in reinterrogation before honoring his request. Such a situation easily can be interpreted as a deliberate attempt to break a suspects' will and a means of extracting a confession that otherwise would not be given.

In short, there was a powerful reason to adopt the *per se* rule in *Edwards* and there continues to be a powerful reason to retain that *per se* rule.

IV. RESPONSE TO SOLICITOR GENERAL'S ARGUMENT.

If one carefully examines the facts of this case, most of the argument of the Solicitor General does not even apply. He presumes a simple case where a defendant is arrested on State Charge One, and then is later interviewed in jail by a different agency with no contact whatsoever with the earlier agency in Federal Charge Two. This case is not so simple. In the present case, Mr. Roberson was questioned four times on Crime One and then questioned on Crime Two. The questioning in Crime Two involved one new officer not present previously and another officer who had previously violated Mr. Roberson's right in questioning him on Crime One. Thus, whether or not the Court decides to continue the bright line rule of *Edwards* from a policy point of view, the present case clearly involved badgering by the police and clearly involved facts such that the trial court's finding that the confession was involuntary should be upheld.

The Solicitor General's brief, like the State's brief, makes the error of focusing primarily on the actions of the police rather than on the state of mind of Mr. Roberson. In general, when a defendant is being investigated, he is not informed of the subject of the investigation or whether the investigation is in any way related to prior questioning. The main fact that he is aware of is that he is in jail and persons are asking him questions about crimes. A defendant is not aware, nor should he be required to be aware, of the intent of the investigator.

By eliminating the bright line rule of *Edwards* as the Solicitor General suggests, the courts would then have to inquire into the content of the conversations between the defendant and all of the investigators. The Court would have to inquire whether officers knew of prior invocations by the suspect, and officer credibility would be questioned. There is also great potential for abuse. The law, as requested by the Solicitor General, would put a premium on ignorance. Indeed, if the approach argued for by the Solicitor General is taken, it is imaginable that law enforcement agencies would adopt a policy of not inquiring into whether a defendant has requested counsel before approaching that defendant for questioning in a situation where he is in custody on another charge. To take the argument to its most absurd result, a person who is wanted on various multi-state and multi-agency crimes could be questioned ten times in a single setting, so long as the questions were regarding separate investigations by separate officers. In effect, all the abuses which were prevented by *Edwards* would be allowed so long as defendant happened to be the subject of several different investigations.

The Solicitor General argues that "while law enforcement officials involved in a single investigation can reasonably be required to be aware that the suspect has requested counsel and to treat him accordingly, it is far more burdensome to require every investigator to determine whether any suspect he questions in custody has previously requested counsel in connection with any unrelated investigation." This statement lacks common sense. Any investigator would have to determine that the suspect was in jail and being held on a certain charge. It would be very easy to review the arrest information to determine whether or not the suspect has requested

counsel. Indeed, if there were ever a time that it would be difficult to determine whether a suspect had requested counsel, it would be during the booking process of a single incident arrest. This case is on point. Mr. Roberson was questioned by several officers after he had requested counsel in response to the *Miranda* warnings of the first officer who spoke to him. All four of the officers who clearly violated Mr. Roberson's Fifth Amendment rights were involved in the first investigation and ignorant of his invocation. This is a burden law enforcement officials have been required to live with for some time, and it has not caused any major problems. To require the same of investigators from different agencies at a time when the defendant has already been booked into custody would not be an additional burden.

The Solicitor General also argues about the extreme value of the interrogation process. This Court is referred to the language cited earlier in this brief about the history of the Fifth Amendment. Important to that history is the policy that interrogation is not to be relied on as the primary tool of law enforcement agencies.

The Solicitor General argues that the defendant may have a different motivation in the second investigation to speak. Again, this argument presumes that the suspect will have been clearly informed of the two different investigations that are occurring. This was clearly not the case nor would it be generally. As soon as a suspect is arrested and charged with a crime, requests to remain silent and requests counsel, he will not gain any more information on any investigation except through counsel. In the event the defendant needs information, his attorney provides it. The Solicitor General requests that this Court distinguish between separate interrogation relating to separate crimes and a truly "independent investigation." The Solicitor General does not give this Court any suggestion as to how to define "independent investigation." Any definition would have to focus on the mind of the defendant, and that being so, no definition would work. Especially applied to this case where an investigator from Crime One was present during the questioning on Crime Two, there clearly could be no finding that these cases were totally independent of each other.

Finally, while the Solicitor General and the various other briefs filed in this matter all argue that there would be less chance of an involuntary waiver when the interrogations were related to separate investigations and/or separate crimes, no brief explains why. The Solicitor General's argument should not be accepted by this Court as it would trade a bright line rule for a very complicated analysis of whether an investigation was adequately independent. It would switch focus from the state of mind of the defendant to the actions of agencies in determining whether somebody made a confession voluntarily. This would be inappropriate since the Fifth Amendment has as its main purpose an individual's right to remain silent.

Even if the Solicitor General's arguments are agreed to in the abstract, that clearly cannot apply to this case where there were not independent investigations. There were so many different violations of Mr. Roberson's rights that there was unquestionable badgering by the police, and Mr. Roberson, because of all the facts of the case, did not make a voluntary confession.

CONCLUSION

This case is a simple one to decide when the confused analysis of the Petitioner is set aside. *Miranda* and *Edwards* hold that a defendant's right to silence under the Fifth Amendment also entails the right to have an

attorney present before speaking while in custodial interrogation. The bright line rules of *Miranda* and *Edwards* require a finding that where a defendant remains in custody after requesting counsel, any subsequent interrogation would be unduly coercive and, therefore, statements made in subsequent interrogations must be suppressed. The subject matter of those interrogations and the mental state of the police is irrelevant under Fifth Amendment analysis since it is the voluntariness of the statements that is the issue. In the present case, Mr. Roberson clearly decided to speak to counsel before making statements to the officers and indicated as much to the police. He was then confined for several days and reinterrogated without speaking to a lawyer. The statements made during the subsequent interrogation were properly suppressed.

The trial court and the Court of Appeals correctly held that the statements should be excluded from the State's case-in-chief. This Court should affirm the lower courts' decisions.

Respectfully submitted,

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